In the Matter of	)	Date Issued: June 17, 1999
ORA L. SNOWDEN, Claimant	)	Case No. 1998-LHC-1164
	)	OWCP No. 06-164853
against	)	
INGALLS SHIPBUILDING, INC., Employer	)	

APPEARANCES:

WYNN E. CLARK, ESQ.
Scruggs, Millette, Bozeman & Dent
610 Delmas Avenue
Pascagoula, Mississippi 39567
On Behalf of the Claimant

RICHARD P. SALLOUM, ESQ.
Franke, Rainey & Salloum
2605 14th Street
Gulfport, Mississippi 39501

Before: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This matter arises from a claim under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., ("the Act"), and the governing regulations thereunder. A claim was filed by Ora L. Snowden ("Claimant") against Ingalls Shipbuilding, Inc. ("Employer"), alleging Hand-Arm Vibration Syndrome ("HAVS") and/or carpal tunnel syndrome as the result of her use of vibratory tools. The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges; a formal hearing was held on December 8, 1998 in Gulfport, Mississippi, and continued on December 23, 1998 in Metairie, Louisiana.[1] All parties were afforded a full opportunity to adduce testimony, offer evidence, and submit post-hearing briefs.

[1] The hearing was recessed until December 23, 1998, to allow Employer to present the testimony of two physicians, Dr. Harold Stokes and Dr. Eric George.

A brief discussion of HAVS and carpal tunnel syndrome ("CTS") is necessary.[2] HAVS is a relatively new type of claim, and although acceptance by the medical community is growing, there has yet to be universal acceptance of HAVS as a distinct diagnosis. HAVS is thought to result from repetitive use of vibratory tools, with common symptoms including peripheral vascular disorders (blanching, vasospasm, or "whitefinger") and peripheral neural disorders (tingling, numbness, pain, loss of grip strength, loss of dexterity, and loss of sensitivity). No single test is sufficient for a HAVS diagnosis, as not all patients exhibit all symptoms; instead, diagnosis is usually based on a combination of positive test results and employment history. According to a NIOSH study, development of HAVS depends on a variety of factors, including: vibration level of the tool (also called level of acceleration); amount of daily and cumulative tool use; how the tool is held; use of protective gear; and latency period between exposure and symptoms.

HAVS is often mistaken for CTS (and vice versa) although the actual damage wrought by the two is thought to be different. CTS causes neuropathy of the median nerve in the wrist; excessive or awkward use of the hands and arms causes inflammation, fluid build-up, and swelling of the tissues and tendons inside the carpal tunnel, resulting in pressure on the median nerve. In contrast, HAVS appears to affect the peripheral nerves and vascular systems directly. Differentiating between the two conditions can be difficult; however, it is thought that only the median nerve will show damage in a CTS patient, while both the median and ulnar nerves show degradation on nerve conduction tests in a HAVS patient.[3]

Another major difference between HAVS and CTS involves treatment options: unlike HAVS for which there is no known treatment (other than to remove the worker from exposure and to try to ease painful symptoms), CTS patients often (but not always) receive relief from surgery that opens the carpal tunnel to release the fluid and swelling. Surgery usually provides little relief to true HAVS patients, as surgery cannot restore damaged peripheral nerve fibers.

STIPULATIONS

Prior to the hearing, the parties entered into a series of stipulations (JX-1)[4]:

1. Jurisdiction is not contested;

---

[2] Much of this information is borrowed directly from Morgan v. Ingalls Shipbuilding, Inc., 29 BRBS 508 (ALJ)(August 25, 1995). HAVS was first recognized and discussed by the National Institute for Occupational Safety and Health ("NIOSH") in September 1989 (Publication Number 89-106), the original source of much of the information presented in Morgan.

[3] A true HAVS patient usually shows at least some degree of vascular damage as well.

[4] References to the transcript and exhibits are as follows: Transcript (TX); Claimant's Exhibit (CX-__); Employer's Exhibit (EX-__); Joint Exhibit (JX).

2. Employer was advised of the injury via an LS-203 dated 4/5/95, and a Formal Notice dated 5/26/95;

3. Notices of Controversion were filed on 4/10/95, 4/21/95, and 2/4/98;

4. Average Weekly Wage at the time of the alleged injury was $204.50;

5. Claimant was employed by Respondent part of 1972 and from 1977-80, first in the paint department, and later in the ship cleaning department;

6. No compensation has been paid to date.

ISSUES

The following issues were listed as unresolved on the Joint Exhibit:

1. Whether an injury actually occurred and causation of same;

2. Any superseding or intervening injuries;

3. Nature and extent of disability;

4. Effect of statute of limitations;

5. Effect of Section 933 on the claim;

6. Penalties, interest, and attorney fees.

FACTS

Claimant was born September 14, 1939. (TX, p. 20). She first worked for Employer in 1972 in the paint department, using several different types of air-driven tools, including a "rust machine," a "needle gun," and a grinder. (TX, p. 23-24). She primarily used the "rust machine," which she described as the tool having the most vibration. (TX, p. 26). Claimant testified that she usually operated these types of tools for 18-20 hours of her 40 hour work week (TX, p. 28), with the remainder of her work week spent painting. (TX, p. 35). Claimant left Employer at the end of 1972 or the beginning of 1973 to have a child; she then went to work at Singing River Hospital in 1973 as a housekeeper.[5] (TX, p. 47; see also CX-4, EX-9 (Claimant's Social Security Records)). In 1977,

[5] The employment history revealed by Social Security records and Claimant at the hearing differs markedly from what she had reported earlier. Dr. Cope's 1995 report relates that Claimant worked for Employer from 1972 to 1981, using vibratory tools up to 20 hours per week. (CX-1, att. 2, p. 1). Similarly, Dr. Stokes' report of July 1998 states Claimant reported working for

Claimant again was employed by Employer, this time in the ship cleaning department. (TX, p.23; see also CX-4, EX-9). She primarily swept the ships, and denied using any air-driven or pneumatic tools during this later employment. (TX, p. 23, 39, 44).

Claimant testified that she first noticed problems with her hands and arms in approximately 1984; her hands and arms go numb, tingle, and swell, with the right hand worse than the left. (TX, p. 37).[6] She also stated that the tips of her fingers often take on a white color which lasts approximately 5-10 minutes. (TX, pp. 37, 39). Her symptoms frequently wake her at night, and she has had trouble with finger dexterity. (TX, p. 40). Claimant also notes that her symptoms are often triggered by cold weather. (TX, p. 40). However, she did not seek treatment for these complaints, and continued working in other jobs; she denies ever using any other air-driven or pneumatic tools in these other jobs. (TX, p. 38). Claimant continues to have problems with her hands and swelling of her wrists, although the right hand is frequently worse. (TX, p. 42).

Since last working for Employer, Claimant has held various cooking and janitorial jobs, but she denies using any power equipment other than a vacuum cleaner. (TX, p. 50). In 1995 she began working for Isle of Capri casino as a housekeeper; while there she injured her left shoulder (rotator cuff) in 1996, and underwent surgery in August 1996. (TX, pp. 51-52). Claimant attempted to return to work as a coin sorter, but continuing shoulder problems caused her to leave the job. (TX, p. 52-53). Her physician assigned her a 30% disability rating after the shoulder surgery. (TX, p. 53). Claimant received over $50,000.00 in medical and compensation benefits as a result of that injury. (TX, p. 53). Claimant also has an asbestos claim pending against Employer, as well as a lawsuit against pneumatic tool manufacturers. (TX, pp. 53-54).

Dr. Cope's Testing

In 1995, after receiving a letter from attorney Richard Scruggs, Claimant underwent a series of tests at Diagnostic Services Clinic, supervised by Dr. John Cope. (TX, pp. 40-41).[7] Dr. Cope graduated from Emory University School of Medicine and served his residency in orthopedics; he

---

Employer from 1972 to 1981 as a painter's helper using vibratory tools. (EX-10, p. 1). Claimant stated in her July 1998 deposition that she had worked for Employer for nine years (in both painting and ship cleaning) except for time off to have a baby. (EX-17, p. 5).

[6] Again, different dates have been reported for the onset of Claimant's symptoms. Dr. Cope's records consistently indicate symptoms began in 1984. (CX-1, att. 2, p. 1; CX-2, pp. 5, 9, 10). However, Dr. Stokes records and testimony indicate Claimant's symptoms began in "1988, or perhaps earlier. . . ." (EX-10, p. 1; TX, p. 77). Claimant's deposition of July 20, 1998 is even less clear; she stated "I don't remember exactly how long it's been," though she did recall that the symptoms did not begin until after she left Employer in 1981. (EX-17, p. 22).

[7] Claimant's testimony suggests that she was never evaluated by Dr. Cope; instead she was seen by another physician who worked for Dr. Cope, named Whitlock. (TX, pp. 54, 59-60).

later became board certified in orthopedics. (Master Claimant's Exhibit 4, p. 1). Dr. Cope did not testify at the hearing; however, both his original report and a later affidavit of December 3, 1998 were entered into the record.

Testing began with a general history and medical exam, followed by nerve conduction velocity testing,[8] current perception threshold testing,[9] vibrometry testing,[10] and cold water immersion testing (or cold challenge testing).[11] (CX-1, pp, 1-2). As described above, Claimant reported 9 years of vibratory tool use, for 20 hours per week, and symptoms of finger blanching (digital vasospasm), numbness, and tingling since 1984. (CX-1, att. 2, pp. 1-2). Claimant described the entire testing process as lasting "an hour or two." (TX, p. 41).

Dr. Cope's affidavit states that a diagnosis of HAVS should be based on the history, physical exam, and test results. (CX-1, pp. 5-6). Claimant's test results showed abnormal nerve conduction velocity tests, moderate to severe sensorineural changes, and moderate to severe vascular changes in all five fingers of her right hand. (CX-1, pp. 6-7). In her left hand, Dr. Cope found no significant change in nerve conduction velocities, but changes in the vibrometry and current perception threshold tests and moderate to severe vascular changes in all 5 fingers. (CX-1, p. 7). In Dr. Cope's 1998 affidavit, he concluded that Claimant suffers from moderate right carpal tunnel syndrome ("CTS") and bilateral HAVS (CX-1, p. 6), and that Claimant's use of vibratory tools "caused, contributed to, or aggravated the conditions of carpal tunnel syndrome and hand arm vibration syndrome."[12] (CX-1, p. 7). He assigned permanent partial impairments of 15% to the right upper extremity, and 10% to the left upper extremity. (CX-1, p. 7).

---

[8] This test measures the motor and sensory velocity of the median and ulnar nerves of the hand and wrist. (CX-1, p. 5).

[9] This test measures the minimum electrical stimulation needed to produce sensation in certain nerves. (CX-1, pp. 4-5).

[10] This test measures the minimum level of vibration the subject can sense on her fingertips. (CX-1, p. 4).

[11] This test is used to detect digital vasospasm, or a loss of blood flow to the fingers due to constriction of the blood vessels. The subject's hands are immersed in cold water for a certain length of time, and then temperature sensors are used to determine the length of time needed for blood flow to warm the hand. (CX-1, p. 5)

[12] Curiously, Dr. Cope's original report of October, 1995 does not make a finding of carpal tunnel syndrome. (CX-1, att. 2, p. 1).

Dr. Stokes

Dr. Harold Stokes graduated from medical school at the University of California (Irvine) in 1965, served in the U.S. Navy, did his residency in orthopedic surgery, served two fellowships in hand surgery, and became board certified in orthopedic surgery with a certificate in added qualifications in surgery of the hand. (TX, p. 70; EX-19). He has been a practicing orthopedic surgeon in the New Orleans area for 25 years, and has limited his practice to the hand since 1989. (TX, p. 71).

Dr. Stokes and several other physicians set-up a testing procedure to evaluate Claimant on behalf of Employer on July 13, 1998. (TX, p. 74). Dr. Stokes took a medical history, performed a physical evaluation, and ordered and reviewed a series of x-rays of her hands. (TX, p. 74). Two certified occupational hand therapists then performed grip testing, range of motion testing, and basic neurologic function testing. (TX, p. 74). Claimant next underwent vascular and "cold challenge" testing performed or supervised by Dr. Eric George.[13] (TX, p. 75). Other neurologic and electrodiagnostic testing was performed by a board certified neurologist, Dr. Hugh Fleming.[14] (TX, p. 75). Claimant then met with Dr. Stokes again to review the results. (TX, p. 75). The full process took an entire day. (TX, p. 76).

Claimant told Dr. Stokes she was employed by Employer from 1972 to 1981, and that she had used various vibrating tools for 2-3 hours per day during that time. (TX, p. 76). She told him she then worked as a custodian and housekeeper until 1997, when she quit work due to her left rotator cuff injury. (TX, p. 77). Claimant reported that she began experiencing symptoms of numbness and tingling in her hands in 1988 or earlier, with the symptoms primarily occurring at night. (TX, p. 77).

Tests showed "no vascular compromise was apparent in any of the digits of either hand," which according to Dr. Stokes would "tend to mitigate against the presence of Hand and Arm Vibration Syndrome." (TX, p. 78). None of the tests revealed any finger blanching or vasospasm. (TX, p. 80). Other tests revealed normal finger dexterity, normal ability to identify objects by feel, and a normal range of motion in all her digits. (TX, pp. 80-81). Dr. Fleming's electromyograms and nerve conduction studies of the ulnar nerves were also normal. (TX, p. 81).[15]

From these results, as well as his review of Dr. Cope's report, Dr. Stokes concluded Claimant did not have any evidence of HAVS in either hand. (TX, p. 79; EX-10, p. 3). Dr. Stokes felt that Claimant's short employment history of vibratory tool use (approximately six months, as revealed by

---

[13] Dr. George's qualifications are discussed below.

[14] Although he did not testify at the hearing, Dr. Fleming's qualifications were provided in EX-21. Dr. Fleming graduated from Louisiana State University School of Medicine in 1974, served his residency in neurology, and became board certified in 1979. (EX-21).

[15] A 15 page report of Claimant's visit that day was presented as EX-10.

Claimant's testimony at the hearing) and the long latency period between her last use of such tools and the onset of symptoms (approximately 1973 to 1984) was also inconsistent with a diagnosis of HAVS. (TX, pp. 83-84). At the hearing, Dr. Stokes was asked if there is "any reasonable basis under any recognized medical diagnostic criteria to conclude this Claimant had Hand Arm Vibration Syndrome," to which he simply replied, "No." (TX, p. 84).

However, Dr. Stokes did diagnose Claimant with "what appears to be a mild carpal tunnel syndrome" in her right hand, which is probably causing her numbness and tingling. (TX, p. 80). Despite reports that numbness and tingling can be early signs of HAVS, due to the absence of vascular findings, Dr. Stokes opined that carpal tunnel syndrome probably was the cause of her symptoms.[16] (TX, p. 80). Dr. Stokes also felt there was no relationship between Claimant's work for Employer and the onset of her symptoms of CTS; if there was, he said he would expect symptoms to manifest while Claimant was still using vibratory tools, not years later. (TX, p. 85, 133). Dr. Stokes explained that Claimant's CTS could also be influenced by her menopause, as studies have shown that CTS is affected by hormone levels. (TX, p. 131). If he were to assign impairment ratings for the CTS, he would give: 5% hand, 4.5% upper extremity, and 2.4% whole body. (TX, p. 87).

On cross-examination, Dr. Stokes stated that he does recognize HAVS as a legitimate diagnosis, and he has made such a diagnosis on other patients. (TX, p. 88). However, in the last 25 years, he has seen only 4 or 5 patients he would say have true hand arm vibration syndrome. (TX, p. 117).[17] Although Dr. Stokes said he is aware of reports showing a 12 year (or more) latency period from initial tool use may be possible with HAVS, he believes such a long period is unrealistic. (TX, pp. 105-06). Dr. Stokes agreed that the 1989 NIOSH study was "a very thorough evaluation," but he doesn't accept its findings that latency periods for both CTS and HAVS can be in excess of 12 years. (TX, p. 107). In addition, he explained that it is unclear how these studies define "latency;" for example, if a person develops symptoms 12 years after first using vibratory tools, an important consideration is how long during those 12 years the person actually used the tools. (See, e.g., TX, p. 122). Dr. Stokes also disagrees that limited use and a long delay in onset of symptoms, such as Claimant had in this case, is consistent with HAVS. (TX, p. 127, 129, 138-39). In answer to a question regarding whether Claimant could develop CTS after only 9 months of tool use, he answered "she could, if she developed symptoms while she was using the tools." (TX, p. 140).

---

[16] Describing the difference between CTS and HAVS, Dr. Stokes stated that usually vascular findings are present in a true HAVS patient, but not in a patient with CTS from the use of vibratory tools. (TX, p. 89).

[17] Dr. Stokes has recently evaluated a number of patients on behalf of Employer for similar claims; of the 20 or so most recent evaluations, there were only one or two patients he felt had evidence of true HAVS. (TX, p. 91). However, of these same patients, probably more than half had evidence of carpal tunnel syndrome. (TX, p. 96).

Dr. Stokes described the testing protocols used by Dr. Cope as "fine," however, he said they "didn't go into the same detail that our studies did." (TX, p. 109). He also stated that he would rely more on the neurologic testing results of Dr. Fleming, as he is an "expert in neurology," not an orthopedic surgeon performing neurologic tests like Dr. Cope. (TX, pp.112- 113). However, Dr. Stokes did not specifically disagree with Dr. Cope's nerve conduction velocity testing results, or with the protocol used for the cold water testing; he explained that the tests performed by Dr. George and Dr. Fleming simply yielded different results. (TX, p. 114).

Dr. George

Dr. Eric George graduated from Marshall University School of Medicine in 1989, and did his residency in general surgery. (EX-20, p. 1). He then was awarded a fellowship in plastic and reconstructive surgery, followed by a second fellowship in orthopedic hand and microsurgical reconstruction. (EX-20, p. 1). Dr. George is board certified in plastic and reconstructive surgery, and specializes in microsurgery and surgery of the hand. (TX, p. 144).[18] Dr. George stated that he has made four diagnoses of (or found evidence of) HAVS in his career, one of whom was a current or former employee of Employer. (TX, p. 152).

Dr. George explained that individual studies can not diagnose HAVS; instead, the results of different studies must be combined with a patient's history, general physical exam, and other information to make a formal HAVS diagnosis. (TX, p. 153). Test results which would lead to a HAVS diagnosis include: ischemic changes (definite vascular or vasospasm changes), a history of vibratory tool use, numbness and tingling in the fingers, and pain in the fingers. (TX, p. 156).

The vascular studies he supervised were extensive, including a cardiovascular history, blood pressures in each arm, Doppler ultrasound, Doppler flow study, photoplasmography (a more advanced study than simple visual exam for blanching (TX, p, 160)), and two different cold provocation tests (short and long term). (TX, p. 145-147). All of these tests check for normal blood flow into the hands and fingers, because it is believed that changes in the blood flow are an indication of HAVS. (TX, p. 148). Dr. George's studies found no evidence of vasospasm (white finger or finger blanching), nor any evidence of HAVS. (TX, pp. 148-49). As for Claimant's carpal tunnel syndrome, Dr. George said it was mild, such as could be expected from a random sampling of adults. (TX, p. 150).

Although Dr. George did not review the actual records of Dr. Cope, from what he knows of them he agreed that the protocols used were generally acceptable, but they were not as extensive in the vascular testing as his own tests. (TX, p. 157).

---

[18] Dr. George described his training in plastic reconstructive surgery as "very intense" into microvascular surgery. (TX, p. 144).

DISCUSSION

In arriving at a decision in this matter, it is well settled that the fact-finder is entitled to determine the credibility of witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Assoc., Inc., 390 U.S. 459, 467, reh'g. den. 391 U.S. 929 (1968). It also has been consistently held that the Act must be construed liberally in favor of claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g 990 F.2d 730 (3rd Cir. 1993).

Preliminary Matters

Jurisdiction

33 U.S.C. § 903(a) provides in part: "compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock . . . or other adjoining area customarily used by an employer in repairing, dismantling, or building a vessel)." In addition, Section 902(3) of the Act provides that "employee means any person engaged in maritime employment, including . . . any harbor-worker including a ship repairman, shipbuilder, and ship breaker . . . ." The Joint Exhibit states that the parties have not contested jurisdiction under the Act (JX-1), and based upon the circumstances of Claimant's employment as revealed by the uncontroverted testimony and record, the court agrees and finds jurisdiction clearly proper under the Act.

Timeliness

Employer has argued in its post-hearing brief that the claim is untimely under Sections 12 and 13 of the Act, regardless of whether it is seen as a traumatic injury claim or as an occupational disease claim. (Employer's Post-Hearing Brief, p. 16).

Section 12(a) of the Act generally provides that notice of an injury must be given within 30 days of the injury, or within 30 days of the time the employee (or beneficiary) becomes aware of the relationship between the injury (or death) and employment. (See 33 U.S.C. § 912(a)). However, in

the case of an occupational disease which does not immediately result in injury or death, the time is extended to one year after the employee becomes aware (or should have become aware) of the relationship between the employment, the disease, and the disability. (See 33 U.S.C. § 912(a)).

Section 13 of the Act provides time limits for the actual filing of claims. Section 13(a) provides that an employee has one year from the date of injury to file a claim, but this period shall not begin to run until the claimant is aware (or should have been aware) of the relationship between the injury and the employment. (See 33 U.S.C. § 913(a)). However, in the case of an occupational disease which does not result in immediate death or disability, an employee has two years from the date of awareness (or the date the employee should have been aware) of the relationship between the employment, the disease, and the disability. (See 33 U.S.C. § 913(b)(2)).

Employer has argued that since Claimant stated she first began to experience symptoms in 1984, and her claim was not filed until 1995, her claim should be found untimely regardless of whether it is considered to be a traumatic injury or an occupational disease. (Employer's Post-Hearing Brief, p. 16). Employer also points out that despite her symptoms, Claimant did not seek evaluation or treatment of until 1995 (Employer's Post-Hearing Brief, p. 16), presumably implying that in the exercise of "reasonable diligence," Claimant should have been aware of the relationship between her employment and her symptoms much sooner. (See 33 U.S.C. §§ 912(a), 913(a), and 913(b)(2)).

The court is convinced that no matter whether HAVS claims are viewed as traumatic injuries or occupational diseases, this claim was timely. Section 13(a) provides one year to file from the date an employee is aware (or should have been aware) "of the relationship between the injury or death and the employment;" Section 13(b)(2) provides that in an occupational disease case, the claim must be filed within two years of the date employee became aware (or should have been aware) "of the relationship between the employment, the disease, and the death or disability . . . ." It is clear that Claimant was not aware of the relationship between her employment and her symptoms until March 1995, when she returned to Dr. Cope's office for a follow-up after her initial testing. Even though Claimant may have been aware of her symptoms as early as 1984, she continued to work in other jobs, and testified that she did not know what was wrong with her hands until she saw Dr. Cope. (TX, p. 58). Claimant's follow-up appointment was March 25, 1995, and her claim was filed April 5, 1995, well within even the most restrictive one year limitation, thus making the claim timely.

In addition, since the court has found that Claimant only acquired the requisite knowledge on or about March 25, 1995, and Employer filed an LS-202 First Report of Injury on April 13, 1995, clearly Employer had notice of the injury in a timely fashion. Thus, whether the court rules that her initial claim meets the minimum notice requirements of Section 912(b), or that failure to give notice is excused under Section 12(d),[19] clearly notice under Section 12 of the Act is no bar to this claim.

---

[19] Specifically, the subsections which excuse failure to file if the Employer had knowledge of the injury, or if Employer was not prejudiced by failure to file. 33 U.S.C. § 912(d)(1) and (2).

Primary Issues

Causation

The claimant has the initial burden of establishing a prima facie case of compensability by demonstrating that a harm or injury was sustained and proving that working conditions existed or an accident occurred which could have caused, aggravated or accelerated the harm. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990). Once a claimant establishes these two elements of a prima facie case, Section 20(a) of the Act favors claimant with a presumption that links the harm suffered with claimant's employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990); Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981).

To meet her initial burden on her HAVS claim, Claimant introduced the affidavit and report of Dr. Cope, who diagnosed her with bilateral HAVS after performing a series of objective medical tests. (CX-1, with attachments). Employer's physician, Dr. Stokes, stated that the methodology used by Dr. Cope was "fine," although it did not go into the same detail as his own tests, and he disagreed with the results (TX, p. 109); Dr. George also found the protocols were acceptable, although he agreed more extensive vascular testing should have been done, and he disagreed with the results. (TX, p. 157). Claimant testified to intermittent pain, numbness and swelling in her hands and arms, along with finger blanching, for the last 10 to 15 years. (TX, pp. 37-40). Based on Dr. Cope's objective findings and Claimant's own subjective reports of symptoms, the court concludes that Claimant has satisfied the first element of a prima facie case: demonstrating that some kind of harm or injury was sustained.

Claimant must next demonstrate that an accident occurred or working conditions existed which could have caused this harm or injury. Claimant testified that she used vibratory tools for at least a portion of her employment with Employer, although the actual amount was less than initially described. (TX, p. 23, 26). Despite disputes among physicians over the amount and intensity of vibratory tool use needed to induce true HAVS, the court finds that Claimant has at least satisfied the second part of her burden under Section 20(a), to demonstrate that working conditions existed which could have caused HAVS. As she has successfully established both elements necessary to invoke Section 20(a), the court finds Claimant is entitled to the Section 20(a) presumption which links the harm suffered with her employment.

As to Claimant's CTS, the court notes that Dr. Cope's original diagnosis did not include CTS (see CX-1, att. 2, p. 5); however, Dr. Cope's 1998 affidavit did describe CTS on the right. (CX-1, p. 6). Dr. Stokes and Dr. George concluded after their own exams that Claimant does have a mild degree of CTS on the right. (TX, p.80, 150; EX-10, p. 3). Again, Claimant testified to pain, numbness, and swelling in her hands and arms over the last 10 to 15 years. (TX, pp. 37-40). Based on the above, the court finds Claimant has clearly demonstrated the existence of CTS and has satisfied the first element for the Section 20(a) presumption.

The court finds Claimant has also established that working conditions existed which could have caused CTS. Dr. Cope's 1998 affidavit indicates that in his opinion, Claimant's shipyard work "caused, contributed to, or aggravated the conditions of carpal tunnel syndrome and hand arm vibration syndrome. . . ." (CX-1, p. 7). Likewise, Dr. Stokes' testified on several occasions that there is evidence linking some instances of CTS to the use of vibratory tools. (TX, pp. 88-89. 135). Therefore, the court concludes that Claimant has established that working conditions existed which could have caused this particular harm (carpal tunnel syndrome). Having established both elements of her prima facie case, Claimant is entitled to the benefit of the Section 20(a) presumption which links the harm suffered (CTS) with her working conditions (use of vibratory tools).

HAVS -- Employer's Rebuttal and Totality of the Evidence

Once the Section 20(a) presumption has been successfully invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that Claimant's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. The presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990).

Employer presented the testimony of Dr. Stokes and Dr. George, two well-qualified hand surgeons. (EX-19, 20). These physicians put Claimant through an extremely detailed series of tests (see TX, pp. 74-76, describing testing), and concluded unequivocally that Claimant showed no signs of HAVS. (TX, p. 79, 84, 149; EX-10, p. 3). As the court believes Dr. Stokes and Dr. George are better qualified hand experts than Dr. Cope, and since their testing was much more thorough and detailed, the court chooses to place more reliance on their opinions.

The court also finds that Dr. Cope's diagnosis of HAVS was based in part on an incorrect history of vibratory tool use from Claimant. Dr. Cope's affidavit and report state that Claimant worked for Employer for nine years (1972-1981), using vibratory tools for 20 hours per week (CX-1, att. 2, p. 1); Claimant testified at trial (and her Social Security records confirm) that she actually only worked for Employer using vibratory tools for approximately six months in 1972. (TX, pp. 23-24, 28, 47; CX-4, EX-9). Although Dr. Stokes' and Dr. George's report was also based in part on this incorrect history, not only did they find no objective evidence of HAVS, they also testified at trial and were able to modify their opinions based on new information as needed.

The court also finds it curious that Dr. Cope's initial testing did not reveal CTS, but after Dr. Stokes and Dr. George diagnosed Claimant as having CTS on the right, Dr. Cope's affidavit also described Claimant as having CTS on the right. (Compare CX-1, att. 2, p. 5, and CX-1, p. 6). The court also notes that this diagnosis was apparently made without any additional evaluation of Claimant. (See TX, p. 60). Without completely discrediting Dr. Cope's finding of CTS, the court does feel this unexplained change in diagnosis is further reason to discount Dr. Cope's opinion.

Therefore, the court finds that through the testimony of Dr. Stokes and Dr. George, Employer has successfully rebutted the Section 20(a) presumption as to Claimant's HAVS. Once the presumption is overcome, it drops out of the case, and the fact-finder must evaluate all evidence and reach a decision based on the entire record. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., et al., 25 BRBS 15, 21 (1990).

For the reasons stated above, the court has chosen to credit the opinions of Dr. Stokes and Dr. George instead of the opinion of Dr. Cope. All of the physicians whose opinions are present in the record stated that a diagnosis of HAVS must be based on a combination of factors

such as: history, physical exam, vascular studies, and neurological studies. (CX-1, pp. 5-6; TX, p. 153-56). Based on all of their testing, Dr. Stokes and Dr. George found no objective vascular evidence to support a diagnosis of HAVS (TX, pp. 78, 148-49; EX-10, p. 2), and that the neurological findings were more consistent with CTS. (TX, p. 80). Dr. Stokes also felt Claimant's brief history of vibratory tool use, and the long delay before the onset of symptoms, was inconsistent with a diagnosis of HAVS. (TX, pp. 83-84).[20]

As the court has chosen to credit the opinions of Dr. Stokes and Dr. George, who have clearly ruled out a diagnosis of HAVS (and have by necessity also ruled out any causal connection with Claimant's employment), the court finds no evidence that Claimant has HAVS or that it is related to her employment and therefore will DENY her HAVS claim for benefits.

Carpal Tunnel Syndrome — Rebuttal and Totality

While Dr. Stokes and Dr. George did diagnose Claimant with mild CTS, they also stated that they felt this diagnosis was unrelated to Claimant's work for Employer and her use of vibratory tools. (TX, p. 85, 133; EX-10, p. 3). Dr. Stokes explained that he would expect someone with carpal tunnel syndrome from the use of vibratory tools to "have symptoms while they are doing that work." (TX, p. 85). Since Claimant did not begin to complain of symptoms until several years after she left Employer, and an even longer period after she last used vibratory tools, Dr. Stokes believes that there is "far too long an interim between the exposure and onset of symptoms to justify attributing the diagnosis of carpal tunnel syndrome to that type of work." (TX, p. 85). In fact, Dr. George opined that Claimant's CTS was no worse than what a large percentage of the general population would show under similar testing. (TX, p. 150).

As explained above, the court has found ample grounds to credit the opinions of Dr. Stokes and Dr. George over those of Dr. Cope. According to their report, they did not think Claimant's

---

[20] There was much discussion at the hearing over the latency period of HAVS. (See TX, pp. 105-08, 119-130, and 137-142) While the court recognizes there is some dispute among physicians and researchers over this issue, the court finds Dr. Stokes opinion on the subject to be reasonable: that an approximate 15 year latency period after only 6 months of vibratory tool use of 20 hours per week is unrealistic.

CTS was related to Claimant's work for Employer. Therefore, the court finds Employer has rebutted the Section 20(a) presumption as to Claimant's CTS. For the same reasons, the court finds based on a totality of the evidence that Claimant's CTS is not related to her work for Employer.

Other Issues

Section 33

Section 33 of the Act deals with compensation and third party liability. Although listed as an unresolved issue in the Joint Exhibit (JX-1, p. 1), neither party pursued this issue. In opening statements, counsel for Claimant referred to Claimant's subsequent shoulder injury and settlement while working at Isle of Capri Casino, but pointed out that a shoulder injury was clearly separate from her HAVS claim, and that there has been no settlement or release arising out of the HAVS claim. (TX, p. 17). Employer did present various records regarding the shoulder injury and compensation claim (EX-11 to 16), but Employer's counsel did not mention Section 33 in his opening statement (TX, pp. 17-19), and only made a cursory inquiry into the shoulder injury and settlement during cross-examination. (TX, pp. 51-53). Likewise, Employer fails to even mention Section 33 in its post-hearing brief, while Claimant merely points out that there has been no third party settlement for the alleged injury and disability in the instant claim, and thus Section 33(g) is not a bar. (Claimant's Post-Hearing Brief, p. 2).

The court notes that Claimant has an action pending against the tool manufacturers as well; it is possible this is the third party action Employer was concerned about when Section 33 was raised. Because Employer failed to pursue this issue, the court is unclear which subsection of Section 33 Employer was even invoking, and which injury and/or settlement it involved. However, because the court has denied the Claimant's claim for benefits under both the HAVS and CTS theories, this issue is now moot.

Intervening/Superseding Injury

Again, this was listed as an issue in the Joint Exhibit (JX-1), but the parties presented little evidence or discussion. Claimant mentioned the shoulder injury in opening statements, arguing that this injury was clearly distinct from her allegations of HAVS and CTS (TX, pp. 16-17); Employer failed to mention this issue at all in opening statements, and only inquired into it briefly during cross-examination of Claimant. (TX, pp. 51-53). The court also notes that Claimant's physician clearly indicated the impairment ratings he assigned were based solely on HAVS and CTS. (CX-1, p. 8). Although Employer presented several exhibits related to the shoulder injury (EX-11 to 16), Employer has failed to explain how the shoulder injury is an intervening/ superseding injury in relation to Claimant's HAVS and CTS claims. Again, the court's denial of benefits makes this issue moot.

CONCLUSION

Since the court finds the totality of the evidence demonstrates Claimant does not suffer from HAVS, and that Claimant's CTS is not related to her work for Employer, Claimant has not suffered a compensable injury under the Act. Therefore, her claim for benefits is DENIED.

ORDER

It is therefore ORDERED that this claim be DENIED.

So ORDERED this the 17th day of June, 1999 at Metairie, Louisiana

_____
RICHARD D. MILLS
Administrative Law Judge

RDM/bc